SAO 7/2016
BEFORE
THE HON'BLE MR. JUSTICE N.CHAUDHURY

The appeal was initially numbered as RSA No. 14 of 2005 but subsequently on bein g found that it is an appeal under Order XLIII Rule 1(u) of the Code of Civil Pr ocedure it has been renumbered as SAO.

2. In terms of the law laid down by the Hon'ble Supreme Court in Narayan an -vs- Kumaran reported in 2004(4) SCC 26, an appeal under Order XLIII Rule 1(u) of the Code of Civil Procedure is similar in nature as that of second appeal u nder Section 100 of the CPC. So, granting of substantial question of law is nece ssary for admitting such appeal. In this case a substantial questin of law was f ramed while admitting the second appeal .The same substantial question of law is framed by this court at the time of second appeal will also apply in an appeal under Order XLIII Rule 1(u) of the CPC .

3. By the impugned appellate judgment and order dated 29.6.2004 passed i n Title Appeal No. 84 of 2002, the learned first appellate court remanded the ma tter to the learned trial court with a direction to hold local investigation thr ough survey commissioner to ascertain as to whether Exhibit-4 or Exhibit-A attra cts the suit land. This remand order is the subject matter of the present appeal .

4. The appellant herein as plaintiff instituted Title Suit No. 182 of 2000 in the court of learned Civil Judge (Junior Division No.1) at Karimganj against five principal defendants and two proforma defendants stating that land describe d in the schedule to the plaint was owned and possessed by one Sajina Khatun by right of inheritance, from her husband Ajbar Ali. She transferred the property t o her two grandsons, Abdul Basit Choudhury and Abdul Mukhit Choudhury by a regis tered deed dated 6.4.1983 and her son Moniruddin Choudhury being father and lega l guardian of the aforesaid two minors executed yet another registered sale deed dated 12.2.1988 in favour of the plaintiff (Motiur Rahman) and two others who are impleaded as proforma defendants No. 6 and 7 in the suit. Thereafter on 3.7. 1999, the aforesaid two minor sons, namely, Abdul Basit Choudhury and Abdul Mukh it Choudhury after attaining majority executed a fresh registered sale deed in f avour of the plaintiff on 3.7.1999 with respect to the suit land and this is how the plaintiff became owner in possession of the suit land. But the principal de fendants without having any right, title and interest with respect to the suit l and started publicising that they would dispossess the plaintiff giving rise to apprehension as to breach of public peace and tranquillity. The petitioner, ther efore, instituted a proceeding under Section 144 Cr.P.C before the jurisdictiona l Executive Magistrate which on turn was converted into a proceeding Section 145 Cr.P.C. and in terms of the decision of the Lok Adalat of the aforesaid proceed ings, the suit land remained under the title and possession of the plaintiff. Ho wever, the District and Sessions Judge, Karimgang subsequently by an order direc ted the Executive Magistrate to complete the proceeding under Section 145 Cr.P.C .. Eventually the proceeding under Section 145 Cr.P.C. was dropped. The defendan ts thereafter instituted yet another proceeding under Section 145 Cr.P.C agains t the plaintiff which also suffered the same fate of dismissal by the Executive Magistrate. Under the aforesaid circumstances, the plaintiff instituted the suit for declaration of his right, title and interest over the suit land as a land h older and for confirmation of possession along with consequential relief of proh ibitory injunction etc.

5. On being summoned, the defendants appeared and submitted written state ment denying the case of the plaintiff. According to the defendants, original ow ner of the land was Monirudin Choudhury who is none other than the son of Sajina Khatun and he by executing a registered sale deed on 30.9.1982 transferred the suit land in favour of Abdul Malik Chouhury and upon death of Abdul Malik Chouhu ry, the land devolved on the defendants by way of inheritance. According to the defendants, Moniruddin Choudhury subsequently executed another rectification dee

d dated 5.1.1994 thereby changing the schedule mentioned in the sale deed dated 30.9.1982. According to the defendants the schedule described in rectification deed dated 5.1.1994 attracts the suit land and so the defendants are rightful owners in possession of the suit land and the suit of the plaintiff is liable to be dismissed with cost.

6. The learned trial court upon consideration of the rival contention of the parties framed the following four issues:

(i) Is there any cause of action for the suit?

(ii) Is the plaintiff right, title, interest and possession over the suit land?

(iii) Whether the suit land is properly described in schedule to the plaint?

(iv) Whether the plaintiff is entitled to get reliefs as prayed for?

7. In course of trial, plaintiff examined eight witnesses including himself as PW-1. Plaintiff adduced as many as six documents out of which Exhibit-1 is the order dated 24.12.1993 passed in 145 Cr.P.C proceeding, Exhibit-2 is the order dated 9.12.1995 dropping the proceeding under Section 145 Cr.P.C. Exhibit-3 is the order dated 1.2.2000 passed in proceeding under 144 Cr.P.C., Exhibit-4 is the original sale deed dated 12.2.1988, Exhibit-5 is the registered sale deed dated 6.4.1983 executed by Sajina Khatun Choudhury in favour of her minor grandsons and Exhibit-6 is the registered sale deed executed by Gulam Basit Choudhury and Gulam Mukhit Choudhury in favour of the plaintiff. The defendants on the other hand examined four witnesses including defendant No.1 Rafiqul Islam as DW-1. The defendants adduced eight documents including sale deed dated 30.9.1982 as Exhibit-A and the registered rectification deed dated 5.1.1994 as Exhibit-H. It is the case of the defendants that the original land sold by Md. Moniruddin Choudhury on 30.9.1982 vide Exhibit-A has subsequently been the rectified by Exhibit-H deed dated 5.1.1994 By that rectification deed, the khatian number, the dag number of the demised land have been modified. However, no change has been made in the boundaries of the sale deed. This means that boundaries mentioned in Exhibit-A are the boundaries of the land allegedly purchased by the defendants from Moniruddin Choudhury. The learned trial court after considering all these evidence of both sides, decreed the suit of the plaintiff on the basis of Exhibit-4 declaring right, title and interest of the plaintiff over the suit land and for confirmation of possession along with consequential prohibitory injunction. This trial court judgment and decree passed on 22.8.2002 came under challenge in Title Appeal No. 84 of 2002 in the court of learned Civil Judge, (senior Div.) Karimganj. The learned first appellate court having perused the boundaries of Exhibit-4 and Exhibit-A came to hold that the suit land pertains to Khatian No. 404 and Dag No. 447 of kitte Raichand Prakasita underof Parganah Kushiarkool, mouza Dasgram mahal Dashana within the following boundaries:-

East- Land of Abdul Wahid
West- land of Abdul Jabbar
North- Land of Abdul Malik
South - Land of Jamir Uddin

8. The learned first appellate court thereafter examined Exhibit-A and Exhibit-H and came to hold that land claimed by defendants to have been purchased by them from Moniruddin is also covered by Dag No. 404 and 447 of the same Taluk in view of the rectification made in Exhibit-H and thereafter held that the boundaries mentioned in Exhibit-A which is not affected by Exhibit-H are as follows:

(i) East- Wajid Ali Choudhury being owner of Dag No. 614

(ii)West Land of Abdul Sattar & ors.

(iii)North- Land of Abdul Munim Choudhury

(iv) Land of defendant’s brother .

9. After having laid down the boundaries of the two sets of sale deeds, one produced by the plaintiff and the another set produced by the defendants, the learned first appellate court was of the view that it cannot be ascertained with due certitude as in which plot and which schedule the disputed land lies. Having faced such difficulty, learned first appellate court allowed the appeal and remanded the matter to the learned trial court with a direction to hold local inspection by appointing survey commissioner so as to ascertain which of the sale

deeds attract the suit land. This appellate judgment and order passed on 29.6.2004 remanding the matter to the learned trial court under Order XLI Rule 24 of the CPC has been challenged by the plaintiff before this court under Order XLIII Rule 1(u) CPC. This court admitted the appeal on 31.1.2005 and framed the following substantial question of law:

Whether the Judgment and Order passed by the Learned Court below setting aside the decree passed by the learned trial court and remanding the case to the learned trial court is opposed to the weight of the materials on record?

10. I have heard Mr. PK Deka, learned counsel for the appellant and Mr. N Dhar, learned counsel for the respondent. I have perused the lower court records including the depositions of the witnesses of both the sides and the documents adduced by them.

11. Mr. P K Deka, learned counsel for the appellant would argue that under Order XLI Rule 24 of the CPC an appellate court can remand the matter only if it is not possible on the part of the court to decide the matter on merit on the basis of the materials available on record. If there are sufficient materials on record in that event there is no question of remanding the matter to trial court and learned first appellate court is duty bound to decide the matter on merit. In a given case, if it appears that adducing of further evidence is necessary to properly adjudicate the matter in dispute, only in that event question of remanding a case may arise. Placing reliance on the judgment of this court in the case of Mallika Dutta Roy- vs-Bidyut Kr. Deb reported in 2004 (3) GLT 434, Mr. Deka submits that in the instant case the learned first appellate court could have very well decided the appeal on merit on the basis of Exhibits adduced by the parties and the oral evidence given by them. The boundary of the suit land as described in the plaint are same as that of Exhibit-4 and Exhibit-6 adduced by the plaintiff and on the other hand, the boundaries of Exhibit-A is quite different. In Exhibit-H there is no amendment in the boundaries and so boundaries of land furnished in Exhibit-A indicate the land purchased by the predecessor of the defendants. This being the position, the learned first appellate court was not required to remand the matter to the trial court for local investigation and could have decided the lis on the basis of the available materials.

12. Per contra , Mr. N Dhar learned counsel for the respondents would argue that the dag number and khatian number of the land purchased by the plaintiff as well as by the predecessor of the defendants are same and this is why it is not possible to ascertain as to whether the suit land is covered by Exhibit-4 to entitle the plaintiff to get a decree as prayed for. To be sure in regard to identity of the suit land, the learned first appellate court thought it fit to refer the matter to the trial court and there was no violation of the provisions of Order XLI Rule 24 CPC in any way. The appeal is devoid of any merit and so it is liable to be dismissed.

13. Having heard the learned counsel for both the sides, I have given my anxious consideration in regard to the materials available on record. There is no doubt that a first appellate court cannot remand a matter to the trial court for afresh decision if materials available on record are sufficient to enable the court to decide the matter on merit. Order XLI Rule 24 of the CPC is self explanatory and there is no ambiguity in recital thereof. Order XLI Rule 24 is quoted below:

Order 41 Rule 24. Where evidence on record sufficient, Appellate Court may determine case finally.- Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resetting the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.

14. This court in the case of Lalit Mohan Nath v-s Mohan Nath reported in (AIR 1974 Gau 68) held the view that a remand order when materials are available on record to decide the matter is invalid and the same is violative of the order XLI Rule 24 of the CPC. The same view has been subsequently followed by this court in a number of judgments including the case of Mallika Dutta Roy (supra). In

that view of the matter it is necessary to see as to whether in case in hand the re are sufficient materials to decide the appeal on merit.

15. Plaintiff instituted the suit for declaration of his right, title and interest on the basis of purchase and he has furnished sufficient particulars a s required under Order VII Rule 3 of the CPC at the schedule of the plaint. The schedule of the plaint is quoted below for ready reference :

East - Land of Abdulwahed & Ors.
West- Land of Abdul Jabbar choudhury
North- Land of Abdul Matin Choudhury
South- Land of Jamir Uddin Choudhury

16. According to the plaintiffs, suit land originally belonged to Sajin a Khatun by way of inheritance from her husband Ajbar Ali. Sajina Khatun thereaf ter sold the suit land on 6.4.1983 in favour of Abdul Basit Choudhury and Abdul Mukhit Choudhury who were minors at that time. Their father Moniruddin Choudhury represented them being natural guardian. This Moniruddin Choudhury thereafter b y executing sale deed on 12.2.1988 transferred the suit land to the plaintiff be ing in need of money for care and maintenance of the minor children. The two min or sons on the other hand after attaining majority executed yet another register ed sale deed on 3.7.1999 confirming the sale of the suit land in favour of the p laintiff. Thus, the purchased land of the plaintiff from Moniruddin Choudhury as well as his sons Abdul Basit Choudhury and Abdul Mukhit Choudhury is available from the schedule mentioned in these two sale deeds exhibited as Exhibit- 4 and Exhibit- 6 respectively. Boundaries mentioned in Exhibit- 4 and Exhibit- 6 are s ame and the boundaries are mentioned below for ready reference:

East - Land of Abdulwahed & Ors.
West- Land of Abdul Jabbar choudhury
North- Land of Abdul Matin Choudhury
South- Land of Jamir Uddin Choudhury

17. On the other hand, defendants claimed that their father Abdul Malik Cho udhury had purchased the suit land from Moniruddin Choudhury ,the same person wh o had executed the sale deed in favour of the plaintiff on 12.2.1988. Moniruddin executed Exhibit- A sale deed in favour of Abdul Malik Choudhury on 30.9.1982 in Dag No. 612 of Khatian No. 304. Subsequently, on 5.1.1994 , he executed a rec tification deed to change the dag number and khatian number as 447 and 404 respe ctively. Thus, dag number and khatian number appearing in Exhibit- 4 and that of Exhibit A are same. But by Exhibit-H rectification deed, no amendment has been made in the boundaries of the demised land. Land transferred vide Exhibit-A is b utted and bounded in the east by Abdul Wajid and others and at the west by Abdu l Sattar. Thus, it is not correct to say that boundaries of Exhibit-4 and exhib it -A are the same. The learned first appellate court was required to see as to whether suit land described in the schedule to the plaint is attracted by Exhib it-4 or whether it is attracted by the boundaries mentioned in Exhibit-A. The tw o plots of land may be covered by same dag number and khatian number more partic ularly when both the sellers have inherited the land from the common ancestor. I f there is any discrepancy as to dag number, khatian number or patta number of a land along with their boundaries, it is established law that boundaries shall prevail over the dag number, patta number etc. Had the learned first appellate court confined consideration to the specific boundaries mentioned in Exhibit-A a nd Exhibit-4, he would have been in a position to arrive at a decision as to whe ther the suit land described in schedule to the plaint is attracted by Exhibit-4 or not. If the boundaries of Exhibit-4 and suit land described in schedule to t he plaint are same in that event plaintiff becomes entitled to a decree and if n ot the suit can be dismissed on that ground alone. After all the plaintiff is to prove his own case by adducing oral and documentary evidence. If his document i s not sufficient to hold a view that the land purchased by him is not attracted by a document of title in that event, he may not be entitled to get a decree and the learned first appellate can very well dismissed the suit and if on the oth er hand it is found that boundaries of Exhibit-4 and that of the plaint are the same in that event there is no reason to deny a decree to the plaintiff. Be that

as it may, it is clear that on the basis of the materials available on record, it is possible to decide the appeal either way. The remand order passed by the learned first appellate court, therefore, is in violation of the provisions of Order XLI rule 24 of the CPC. The sole substantial question of law is accordingly decided in the affirmative and the appeal stands allowed. Matter stands remitted to the learned first appellate for deciding the appeal on merit.

18. Registry shall forthwith transmit the records to the learned first appellate court and upon receipt of the records, the learned first appellate court shall issue notice upon the parties either directly or through their engaged counsel.